UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 314, October Term 1957

Argued April 28, 1958 Decided May 28, 1958

Docket No. 24971

THADDEUS G. BENTON,
PLAINTIFF-APPELLANT,

VS.

VINSON ELKINS, WEEMS AND SEARLS ET AL.,
DEFENDANTS-APPELLEES.

Before Clark, Chief Judge, Hincks and Stewart, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, William B. Herlands, Judge, denying the appellant's motion to withdraw the prior voluntary dismissal of his complaint, to set aside an order transferring the action to the United States District Court for the Southern District of Texas, and for leave to file an amended complaint. *Affirmed.*

Thaddeus G. Benton, New York City, Plaintiff *Pro Se* (Lawrence W. Krieger of McNally and Krieger, and Neilson Olcott, New York City, on the Briefs) for Plaintiff-Appellant.

Leo T. Kissam, of Kissam and Halpin, New York City (Joseph M. O'Loughlin of Kissam and Halpin, New York City on the Brief) for Defendant Appellee David T. Searls.

Per Curiam.

Commenced in the Supreme Court of the State of New York, the appellant's tort action was removed to the United States District Court for the Southern District of New York by reason of diversity of citizenship. That court, pursuant to motion, transferred the action to the United States District Court for the Southern District of Texas in accordance with the provisions of 28 U. S. C., section 1404 (a). The appellant then served and filed a notice of voluntary dismissal pursuant to rule 41 (a) (1), F. R. Civ. P.

This is an appeal from the denial of appellant's subsequent motion, filed pursuant to rule 60 (b) (1), F. R. Civ. P., to withdraw the notice of voluntary dismissal, for an order vacating the order transferring the action to the District Court in Texas, and for leave to file an amended complaint.

Motions brought under Rule 60 (b) invoke the discretionary power of the District Court. *Fischer* v. *Dover Steamship Co.*, 218 F. 2d 682 (2 Cir. 1955); *Smith* v. *Kincaid*, 249 F. 2d 243 (5 Cir. 1957). That discretion was not improperly exercised here. The asserted basis for the motion was the appellant's tardy discovery of the Texas two-year statute of limitations in tort actions. It is not at all clear that the applicable limitation period would not be the same whether the case were tried in New York or Texas District Court. See *Headrick* v. *Atchison, T. & S. F. Ry. Co.*, 182 F. 2d 305 (10 Cir., 1950). It is also not at all clear from the record that the appellant was not aware of the Texas statute at the time he filed the notice of voluntary dismissal. In any event, ignorance of the Texas limitation period on the part of the appellant, an experienced lawyer, is not under the circumstances here disclosed the kind of "mistake, inadvertence, surprise, or excusable neglect" contemplated by rule 60 (b).

Affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit

THADDEUS G. BENTON,
Plaintiff-Appellant,

vs.

VINSON ELKINS, WEEMS and SEARLS ET AL.,
Defendants-Appellees.

Before Clark, Chief Judge, and Hincks and Stewart, Circuit Judges.

On Petition for Rehearing.

Thaddeus G. Benton, New York City, plaintiff-appellant, *pro se*, and Lawrence W. Krieger, of McNally and Krieger, and Neilson Olcott, New York City, for plaintiff-appellant.

Per Curiam.

Petition for rehearing denied.

C. E. C.
C. C. H.
P. S.
U. S. C. JJ.

June 23, 1958.

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OCT 21 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 391.

THADDEUS G. BENTON,

Petitioner,

v.

VINSON, ELKINS, WEEMS and SEARLS, a Partnership of Lawyers Composed of JAMES A. ELKINS, WHARTON E. WEEMS, WARREN JEFFERSON DALE, DAVID T. SEARLS, *et al.*, and each of the members of said partnership, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT DAVID T. SEARLS.

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